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IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA

David C. Berlin,

Applicant/Appellant,

vs.

State of North Dakota,

Respondent/Appellee.

Supreme Court No.: 200500300

District Court No.: 04-C-02246

APPEAL FROM ORDER ENTERED DECEMBER 2, 2004, IN DISTRICT  
COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA, THE  
HONORABLE GEORGIA DAWSON PRESIDING

**BRIEF OF APPLICANT/APPELLANT, DAVID C. BERLIN**

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## **STATEMENT OF THE ISSUES**

- I. Whether The Trial Court Should Have Granted An Evidentiary Hearing Before Denying Appellant Berlin's Application for Post-Conviction Relief.

### ***STATEMENT OF THE CASE***

This is an appeal from an Order dismissing Appellant David C. Berlin's (hereinafter referred to as "*Appellant Berlin*") Application for Post-Conviction Relief entered on December 2, 2004, by the Court, the Honorable Georgia Dawson, Judge of the District Court, presiding.

Appellant Berlin initially filed a Pro Se Application for Post-Conviction Relief, which was filed on July 21, 2004 (App. #6) (Civil Docket No. 1). The State submitted a Response, which was filed on August 20, 2004 (App. #7) (Civil Docket No. 8). Indigent defense counsel was appointed and filed a Notice of Appearance dated August 19, 2004 (App. #8) (Civil Docket No. 7). Appellant Berlin requested additional time to supplement the Application for Post-Conviction Relief (App. #9) (Civil Docket No. 10), which was granted by the District Court on September 7, 2004. Appellant Berlin submitted a supplemental Application for Post-Conviction Relief with the assistance of counsel, which included a "*Request For Evidentiary Hearing*" on October 8, 2004 (App. #11) (Civil Docket No. 13). No additional response was submitted by the State and no evidentiary hearing was held. Appellant Berlin's Application for Post-Conviction Relief was denied in the Order referenced above.

## ***STATEMENT OF FACTS***

Appellant Berlin changed his plea and was sentenced at a hearing on November 13, 2003. He was represented by appointed counsel (hereinafter referred to as "*Trial Counsel*"). Tr., p. 1, lines 1-13.<sup>1</sup>

Appellant Berlin waived his right to a preliminary hearing. Tr., p. 1, lines 17-21. The State indicated that it had previously sent a criminal judgment to Appellant Berlin's Trial Counsel "*however, this is a different criminal judgment that I prepared this morning. I do not have a copy for him, but he is aware of the details of that.*" Tr., p. 2., lines 19-24.

It is apparent that at the change of plea/sentencing hearing that Appellant Berlin had some issue with the entry of a guilty plea by indicating at first that he would plead guilty "*with explanation.*" Tr., p. 3, lines 4-8. Further, after the State explained the factual basis for the charges, which basically involved the taking of a pick-up truck and evading law enforcement, Appellant Berlin attempted to provide some explanation. Tr., p. 5, lines 1-19. In spite of the explanation by Appellant Berlin of the facts and circumstances, the Court found that there was a factual basis to support the Court's acceptance of a guilty plea. Tr., p. 5, lines 20-22. Ultimately, Appellant Berlin was placed into the custody of the North Dakota Department of Corrections and Rehabilitation for a period of two (2) years on

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<sup>1</sup> The transcript of the change of plea/sentencing hearing will be hereinafter referred to as "*Tr.*"



Count I and one (1) year on County II, with both Counts to run concurrent with each other. Tr., p. 8, lines 10-21.

In Appellant Berlin's Pro Se initial filing of his Application for Post-Conviction Relief and subsequent filing by appointed counsel, Appellant Berlin alleged that he was told by Trial Counsel that he would receive a sentence of four (4) months. The State submitted a Response to the Application for Post-Conviction Relief containing denials of Appellant Berlin's claims. The State's Response contained factual assertions, which purportedly responded to Appellant Berlin's claims.

#### ***LAW AND ARGUMENT***

The Trial Court erred by failing to grant Appellant Berlin an evidentiary hearing to develop a record regarding the claims set forth in his Application for Post-Conviction Relief.

At the outset, it is helpful to identify the grounds for relief sought by Appellant Berlin. The grounds for relief were as follows:

1. Conviction obtained in violation of the laws of the Constitution of the United States and the laws of the Constitution of the State of North Dakota, pursuant to N.D.C.C. § 29-32.1-01(1)(a). The factual support for this

argument was the allegation by Appellant Berlin that there was no "*complaint*" in this case.<sup>2</sup>

2. Conviction obtained in violation of the laws of the Constitution of the United States of America (Sixth Amendment) or the laws of the Constitution of the State of North Dakota (Art. I, § 12), pursuant to N.D.C.C. § 29-32.1-01(1)(a). The basic factual basis for this claim for relief is that Appellant Berlin claims that Trial Counsel told him he would receive a four (4) month sentence and he ultimately received a two (2) year straight time sentence.

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<sup>2</sup> Counsel acknowledges that this particular issue may be a bit unclear. On the one hand, Appellant Berlin complains that a "*complaint*" was not presented to the State's Attorney's Office; however, a criminal information was filed and signed by the State's Attorney's Office. It also appears that Appellant Berlin is making an argument that he did not receive information related to the complaint made by the victim in this case, if any, which would essentially be a Brady or Rule 16 violation. The undersigned counsel advances this argument only as it was initially identified in the Pro Se Application submitted by Appellant Berlin. Without addressing the merits of this claim, counsel identifies this issue and presents it to the extent that an evidentiary hearing would have assisted the Trial Court in developing facts related to this claimed ground for relief.

3. Conviction obtained in violation of the laws of the Constitution of the United States of America (Fifth Amendment) or the laws of the Constitution of the State of North Dakota (Art. I, § 12), pursuant to N.D.C.C. § 29-32.1-01(1)(a). Appellant Berlin's claim here is that he was required to incriminate himself during the plea stage, which he otherwise would not have acknowledged on the record had he been aware of the exact nature of the sentence imposed.

The standard of review applicable in post-conviction relief proceedings is set forth in Peltier v. State, 2003 ND 27, 657 N.W.2d 238:

"A trial court's findings of facts in post-conviction relief proceedings will not be disturbed unless they are clearly erroneous. Hill v. State, 2000 ND 143, ¶ 17, 615 N.W.2d 135. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made. DeCoteau v. State, 2000 ND 44, ¶ 10, 608 N.W.2d 240. Questions of law are fully reviewable on appeal of a post-conviction

proceeding. Falcon v. State 1997 ND 200, ¶ 9, 570  
N.W.2d 719."

Peltier at ¶ 6.

All three (3) of the above-listed grounds for relief claimed by Appellant Berlin would be better developed through an evidentiary hearing. However, claims for ineffective assistance of counsel are uniquely suited for review in an evidentiary hearing. Ordinarily, a claim for ineffective assistance of counsel should be resolved in a post-conviction relief proceeding so that the parties can fully develop a record on the issue of counsel's performance and its impact on the defendant's case. State v. Palmer, 2002 ND 5, ¶ 12, 638 N.W.2d 18. Pursuant to N.D.C.C. § 29-32.1-04, Appellant Berlin properly submitted a Pro Se Application consistent with the requirements of the statute and, moreover, his Application was refined by counsel to meet the requirements of this statute accordingly (App. #6) (Civil Docket No. 1); (App. #11) (Civil Docket No. 13). Appellant Berlin properly stated the grounds for relief and identified the relief requested, i.e., that the guilty plea entered on November 13, 2003, be withdrawn and that he be granted the opportunity for a trial or, in the alternative, that the criminal conviction be reversed and the charges dismissed. Id.

It should be noted that arguments, citation, and discussion of authorities are unnecessary, an affidavit or other materials supporting the application **may** be attached, but are unnecessary. N.D.C.C. § 29-32.1-04 (emphasis added). In State

v. Bender, 1998 ND 72, 576 N.W.2d 210, the North Dakota Supreme Court refused to require an applicant to include in the original application all supporting evidentiary matter necessary to meet the standard for a potential motion for summary judgment. Bender at 214, ¶ 19. The court, in Bender, described that the purpose of the Uniform Post-Conviction Procedure Act is to develop a complete record to challenge a criminal conviction. Id. at 21, ¶ 20. Specifically, the Court in Bender stated:

"It would be blatantly unfair to subject a defendant's post-conviction application to summary dismissal for failure to provide evidentiary support not available in the record of prior proceedings, when the statute explicitly provides such evidentiary support is 'unnecessary' in the original application."

Id. at p. 214, ¶ 20.

Moreover, the need to develop an evidentiary record is particularly true in cases involving ineffective assistance of counsel which are unsuited to summary disposition. Id. at 214, ¶ 21, *citing* Mertz v. State, 535 N.W.2d 834, 838 (N.D. 1995). Providing an evidentiary hearing in post-conviction relief cases where ineffective assistance of counsel is asserted is consistent with the oft-cited notion that such claims should be brought not through direct appeal, but through post-

conviction relief for that very reason – an evidentiary hearing is allowed to establish a record for review. Id. at p. 214, ¶ 21.

In the present case, there are several areas of the transcript which provide support for Appellant Berlin's contention that he received ineffective assistance of counsel at the change of plea/sentencing hearing on November 13, 2003. At the outset, the prosecutor indicates that Appellant Berlin's Trial Counsel was provided with a criminal judgment.<sup>3</sup> However, a different criminal judgment, which was prepared the morning of the hearing, was provided to the Trial Court. Tr., p. 2, lines 19-24.

Appellant Berlin identified the fact that he agreed to plead guilty; however, he had an explanation. Tr., p. 3, lines 7-8. After the prosecution identified its version of the factual basis, Appellant Berlin identified some concerns he had with the factual basis. First of all, Appellant Berlin suggested that he merely wanted a loan and that he owned the vehicle; however, he "*didn't have legal possession of the car at the time.*" Tr., p. 5, lines 1-5. Secondly, Appellant Berlin indicates that he sold the truck for \$200 and then asked if he could buy it back, which he claims they (the victim) agreed to. Although Appellant Berlin offered \$300, he asserts that the victim would have returned his vehicle in exchange for the original \$200 sales price. Tr., p. 5, lines 10-15. Finally, Appellant Berlin indicates that he did

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<sup>3</sup> In Cass County, the proposed criminal judgment is the State's sentencing recommendation in Felony cases.

pay \$200 for the vehicle the day after and that he still had the truck, at least in his name, but he acknowledges, "*I shouldn't have did [sic] it.*" Tr., p. 5, lines 16-19.

It should be noted that Trial Counsel requested treatment at Thompkins Rehabilitation Center. Tr., p. 7, lines 1-24. It has been suggested by various individuals, including the District Court Judges, prosecutors, and defense attorneys, as well as officials at Thompkins Center that treatment at Thompkins can result in a reduction of time served on a sentence. However, this is not based on any statute, rule, or policy known to counsel. Therefore, it would be speculation that Appellant Berlin would actually serve four (4) months on a two (2) year straight-time sentence. An evidentiary hearing would shed light on this issue to determine if, in fact, Appellant Berlin was told that he would serve four (4) months, which he relied upon as an inducement to plead guilty.

Presumably, if Appellant Berlin did not plead guilty [with the expectation of serving four (4) months] he would not have been required to acknowledge or agree to the factual basis stated as part of the change of plea/sentencing hearing, nor would he have had to admit any conduct in this case.

The benefits of an evidentiary hearing in post-conviction relief cases involving ineffective assistance of counsel are well documented. This is based, in part, on the high standard required for a defendant to succeed on such a claim. A defendant alleging ineffective assistance of counsel has the burden of proving that counsel's assistance was ineffective by demonstrating: (1) counsel's representation

fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by counsel's deficient performance. Mertz v. State – *Supra* at 836. The prejudice element requires a defendant to establish a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different, and the defendant must point out with specificity how and where trial counsel was incompetent and the probable different result. DeCoteau v. State at p. 157, ¶ 6, *citing* Mertz v. State at 836. *See also*, Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellant Berlin's claim that Trial Counsel was ineffective is based upon the representations that he would receive a four (4) month sentence, rather than a two (2) year sentence, are supported, in part, by the record at the change of plea/sentencing hearing, which, at a minimum, establish a prima facie case. However, an evidentiary hearing is necessary for the court to determine if Appellant Berlin can meet the two (2)-prong test identified in Strickland and Mertz.

In response to Appellant Berlin's Application for Post-Conviction Relief, the State submitted a Response, which contained various factual assertions. One of the assertions includes an indication that, "*additionally, the Petitioner's court appointed attorney would dispute that he promised the petitioner that he would receive the sentence the petitioner now alleges.*" This assertion is made without support by affidavit. It appears that both Appellant Berlin and the State have made allegations involving a dispute of material fact. Summary disposition is not proper



if there are material issues of fact. Wilson v. State, 466 N.W.2d 101, 104 (N.D. 1991).

The North Dakota Supreme Court has had no problems reversing District Court's summary denials of applications for post-conviction relief without providing an evidentiary hearing. Eagleman v. State, 2004 ND 6, 673 N.W.2d 241; Wilson v. State, 1999 ND 222, 603 N.W.2d 47; and Wilson v. State, 466 N.W.2d 101 (N.D. 1991). These cases and the other authority cited herein support Appellant Berlin's contention that it was error for the District Court to dispose of his Application for Post-Conviction Relief without an evidentiary hearing.

### ***CONCLUSION***

Appellant Berlin has identified factual issues related to his three (3)-part claim for post-conviction relief. The State has responded with disputed material facts. Therefore, Appellant Berlin respectfully requests that this Court reverse and remand this matter to the District Court for an evidentiary hearing or, in the alternative, vacate his guilty pleas and remand this matter for trial on the merits.

Respectfully submitted this 2<sup>nd</sup> day of March, 2005.

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